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January 23, 2006

The Honorable Charles L. A. Terreni
Executive Director
Public Service Commission of South Carolina
Post Office Drawer 11649
Columbia, SC 29211

Re: Petition of MCImetro Access Transmission Services, LLC for Arbitration with Horry Telephone Company, under the Telecommunications Act of 1996
Case No. 2005-188-C
Our File No. 05-7024

Dear Mr. Terreni:

Enclosed for filing are an original and eleven copies of the Petition for Reconsideration or Rehearing of MCIMetro Access Transmission Services, LLC. Would you please file the original, returning a clocked copy to me in the envelope provided.

By copy of this letter I am all parties of record, by mail and electronically. Thank you for your assistance.

Very truly yours,

WOODWARD, COTHRAN & HERNDON

Darra Cothran

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DWC/bjd

Enclosures.

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BEFORE THE

PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA

In Re:	)	
	)	
Petition of MCImetro Access Transmission	)	
Services LLC for Arbitration of Certain Terms	)	
and Conditions of Proposed Agreement with	)	Docket No. 2005-188-C
Horry Telephone Cooperative, Inc.,	)	
Concerning Interconnection and Resale	)	
under the Telecommunications Act of 1996	)	

PETITION FOR RECONSIDERATION OR REHEARING OF MCIMETRO ACCESS TRANSMISSION SERVICES LLC

Pursuant to S.C. Code Ann. § 58-9-1200 and 26 S.C. Code Regs. 103-836(4), and other law, MCImetro Access Transmission Services LLC ("MCI") submits this petition to the Public Service Commission of South Carolina (the "Commission") seeking reconsideration or rehearing of Order No. 2006-2 (the "Order"). In support of its petition, MCI states the following:

1. On January 11, 2006, the Commission issued the Order in which it ruled against MCI and in favor of Horry Telephone Cooperative, Inc ("Horry") on most of the issues presented. On January 12, 2006, counsel for MCI was served with the Order by certified mail.

2. MCI's substantial rights have been prejudiced because the findings, inferences, conclusions and decisions in the Order are:

a. in error of law;

b. violative of statutory provisions;

c. clearly erroneous in view of the reliable, probative and substantial evidence in the whole record; and

d. arbitrary and capricious or the result of an abuse of discretion.

MCI respectfully petitions the Commission to rehear or reconsider the Order for the reasons described below.

3. In ruling on Issue Nos. 2, 4(a), 7 and 9,[1] the Commission, among other things, erroneously held that MCI is not entitled to obtain interconnection, traffic exchange or number portability arrangements from Horry for purposes of providing services to Time Warner Cable Information Services, LLC ("TWCIS") and other "indirectly" served customers (Order, at 6, 11-14), and that MCI is limited under the proposed interconnection agreement to providing telephone exchange service "directly" to MCI's end user customers, which the proposed agreement defines as "retail business or residential end-user subscriber[s]." (*Id.* at 6; *see id.* at 13-14.)

4. In so deciding, the Commission erred as a matter of law and acted in an arbitrary and capricious manner and abused its discretion in adopting conclusions that violate federal law, including the Telecommunications Act of 1996 (the "Act"), and that were clearly erroneous in view of the reliable, probative and substantial evidence in the record of the proceeding. Several of the Commission's incorrect conclusions are enumerated below:

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[1] Although this petition focuses on Issue Nos. 2, 4(a), 7 and 9, MCI does not intend to imply that it agrees with the other rulings made by the Commission in its Order. To the contrary, MCI reserves its right to challenge in federal court all of the Commission's adverse rulings in the Order.

- "The carrier directly serving the end user customer is the only carrier entitled to request interconnection under section 251(b) of the Act" (*id.* at 6; *see id.* at 9, 12);

- Even though Horry admittedly carries transit traffic, and Horry admits that transit arrangements constitute "indirect" interconnection under the Act (*id.* at 10), "[n]either third parties nor their traffic are part of an interconnection agreement" between two interconnecting carriers (*id.* at 8-10);

- The obligation to transport and terminate traffic under 47 U.S.C. § 251(b) and other law is limited to traffic directly to and from the end user customers of the two contracting telecommunications carriers (*id.* at 7-12);

- "Non-telecommunications" carriers may not interconnect, "directly or indirectly," under 47 U.S.C. § 251(a) (*id.* at 7-8, 10, 12);

- "Unless and until the FCC classifies the provision of Voice Over Internet Protocol ("VoIP") traffic as a telecommunications service, VoIP providers do not have rights or obligations under Section 251" of the Act (*id.* at 8; *see id.* at 12);

- In providing services to TWCIS, MCI is not providing "telecommunications service[s]" under 47 U.S.C. § 153(46) and within the purpose and intent of 47 U.S.C. §§ 251 and 252; nor is MCI a "telecommunications carrier" under 47 U.S.C. § 153(44) entitled to seek

interconnection, the exchange of traffic, or number portability pursuant to 47 U.S.C. §§ 251 and 252 (*id.* at 10, 12, 17);

- Horry need not port numbers to MCI for the use of TWCIS end users (*id.* at 8-9, 16-18); and
- The language proposed by Horry concerning these issues is adopted (*id.* at 15, 17-19).

5. MCI is a "telecommunications carrier" under 47 U.S.C. § 153(44) that provides interconnection, local circuit switching, number portability and other services to TWCIS, and the services provided by MCI to TWCIS are "telecommunications services" under 47 U.S.C. § 153(46). Moreover, MCI, as a "common carrier" under 47 U.S.C. § 153(10), plans to offer, and does routinely offer, to other customers and carriers the same or substantially similar services that it provides to TWCIS. (Docket No. 2005-67-C, T. 220-21.) Thus, MCI has appropriately requested and is entitled to obtain interconnection, the exchange of traffic and number portability from Horry for the purposes it requires, pursuant to 47 U.S.C. §§ 251(a) and 251(b). (Docket No. 2005-118-C, T. 34, 70-71, 76, 82-83, 85, 112, 132; *see* T. 254-55; Docket No. 2005-67-C, T. 57-58, 122, 161, 182-83, 187, 218-19, 220, 227, 241, 244.)[2]

6. Nothing in the FCC's orders or rules prohibits the interconnection, exchange of traffic or number portability that MCI requests. MCI and Horry have agreed

[2] References to the transcript of the proceeding are to "Docket No. 2005-118-C, T." followed by the transcript page number. The issues adjudicated by the Commission in this proceeding are identical to those adjudicated by the Commission in Docket No. 2005-67-C. Accordingly, the Commission took judicial notice of the proceedings in Docket No. 2005-67-C. (Docket No. 2005-118-C, T. 13-14.) References to the transcript of the proceedings in Docket No. 2005-67-C will be identified as "Docket No. 2005-67-C, T." followed by the transcript page number.

that 47 U.S.C. §§ 251(a) and 251(b) govern the parties' interconnection agreement.[3] These statutory provisions require Horry to interconnect, exchange traffic and provide number portability for the services that MCI seeks to provide to TWCIS and other customers. (Docket No. 2005-118-C, T. 34, 83, 70-71, 74-76, 132; *see* T. 254-55, 257; Docket No. 2005-67-C, T. 37, 121, 125, 180-82, 186, 219, 235.)

7. The Commission's rulings on Issue Nos. 2, 4(a), 7 and 9 conflict with the great majority of state commission decisions ruling that carriers in MCI's position are providing telecommunications services and are entitled to interconnect for the purpose of exchanging traffic originated by third parties.[4] The Commission principally relies on the decision in *Virgin Islands Telephone Corp. v. FCC*[5] for the proposition that a telecommunications carrier must offer a service "directly to the public, or to such classes of users to be effectively available directly to the public." (Order at 11.) The Commission simply ignores the FCC's subsequent statement that "[c]ommon carrier services[6] may be offered on a retail or wholesale basis because common carrier status

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[3] *See* the third "Whereas" clause and §1 of the General Terms and Conditions attachment, and §1.1 of the Interconnection attachment.

[4] *See In re Arbitration of Sprint Communications Company, L.P. v. Ace Communications Group, et al.*, Docket No. Arb-05-2, 2005 WL 1415230, Order on Rehearing, Iowa Utilities Board (Nov. 28, 2005); *In the Matter of the Application and Petition in Accordance with Section II.A.2.b of the Local Service Guidelines Filed by: The Champaign Telephone Co., Telephone Services Co., The Germantown Independent Telephone CO, and Doylestown Telephone Co.*, Order on Reconsideration, p. 13, Public Utilities Commission of Ohio (April 13, 2005); *Petition of Sprint Communications Company L.P., Pursuant to Section 252(b) of the Telecommunications Act of 1996, for Arbitration to Establish an Intercarrier Agreement with Independent Companies*, Case 05-C-0170, Order Resolving Arbitration Issues, p. 5, New York Public Service Commission (May 18, 2005) (T. 184-85); *Cambridge Telephone Company, et al, Petitions for Declaratory Relief and/or Suspension or Modification Relating to Certain Duties under Sections 251(b) and (c) of the Federal Telecommunications Act, pursuant to Section 251(f)(2) of that Act; and for any other necessary or appropriate relief*, 05-0259, Order, Illinois Commerce Commission (July 13, 2005).

[5] *Virgin Islands Telephone Corp. v. FCC*, 198 F.3d 921 (D.C. Cir. 1999).

[6] In *Virgin Islands Telephone*, the D.C. Circuit noted that the FCC had "construed the term 'telecommunications carrier' by reasoning that it 'means essentially the same as common carrier.'" 198 F.3d at 926. The FCC's statement concerning "common carriers" in the *Triennial Review Order* thus also applies to "telecommunications carriers."

turns not on *who* the carrier serves, but on *how* the carrier serves its customers, i.e., indifferently and to all potential users."[7] Thus, the Commission has construed the term "telecommunications carrier" too narrowly.

8. The Commission's ruling also completely fails to address the point that under its decision it would be impossible as a practical matter for a facilities-based CLEC to provide switching and interconnection services to third parties, as contemplated by the FCC's Triennial Review decisions. The Commission's ruling effectively forbids wholesale competition by facilities-based CLECs, an outcome that cannot be squared with federal law.

9. Horry's duty to interconnect with MCI and exchange traffic with it is not affected by the format in which the traffic is originated. MCI and Horry have agreed and would be contractually obligated to treat the non-ISP-bound VoIP or IP traffic generated by TWCIS and its end user customers the same as other non-ISP-bound traffic under the proposed interconnection agreement, and the parties also have agreed that intercarrier compensation for all non-ISP-bound traffic under the proposed agreement, including IP-enabled traffic, would be based on the end points of the communications.[8] (Docket No. 2005-118-C, T. 112-13.)

10. Nothing in 47 C.F.R. § 51.701(e), which refers to compensation paid by one carrier to another carrier "for the transport and termination on each carrier's network facilities of telecommunications traffic that originates on the network facilities of the

[7] *Triennial Review Order*, 18 FCC Rcd 16978 ¶ 153 (2003) (emphasis in original.)
[8] *See* § 1.6 of the interconnection attachment of the parties' interconnection agreement.

other carrier," limits the exchange of traffic under 47 U.S.C. § 251(b) to traffic "directly" originated by the interconnecting carriers' end user customers.

11. FCC Rule 51.100 in any event allows for "information services," as distinguished from "telecommunications services," to be provided through interconnection arrangements. (*See* Docket No. 2005-118-C, T. 32-33.)

12. Horry and Spirit Telecom, in which Horry has an ownership interest,[9] provide VoIP and other services that compete with MCI and TWCIS, through interconnection and number porting arrangements and agreements that contain no limitations as to the types of service provided, or for providing service directly to the parties' end user customers. (Docket No. 2005-118-C, T. 36-37, 67, 81-82, 84, 113-14; *see* Docket No. 2005-118-C, MCI Hearing Exhibits 2 &3; Docket No. 2005-67-C, T. 60, 69, 73, 110, 135-36, 171, 186, 194, 228-29.)

13. The Commission's restrictions regarding number portability are inappropriate because there is no limitation in the Act concerning the obligation to port numbers based on the "type" of service the end user customer had before and after the port, or on whether the service to be provided after the port constitutes "telecommunications services." Nor does the duty to port depend on whether the porting

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[9] Although the Commission impermissibly relies on the statements of Horry's counsel, rather than evidence, to conclude that Spirit Telecom is not "affiliated" with Horry (Order at 13, n.18), what is critical is that Horry benefits financially – which it unquestionably does - from its relationship with Spirit Telecom, and Horry then refuses to interconnect with MCI. Horry thereby ensures that TWCIS' services will not compete with Horry's as well as Spirit Telecom's services.

Thus the point of the discussion of E911 interconnection provided by MCI (*see* Order at 14) is that, if Horry can refuse to interconnect with MCI if the purpose of interconnection is to provide for the exchange of traffic that originates with TWCIS, then it is less likely that MCI would be able to provide merely E911 interconnection, and no other services, to TWCIS, leaving the field for such services to Horry. The Commission seemingly implicitly recognized this inference when it quoted Horry witness' testimony that "one of the ways a VoIP provider can satisfy an E-911 requirement is to connect through an incumbent LEC." (*Id.*)

carriers are "telecommunications carriers," or whether the service is to be provided at the same location both before and after the port. The FCC has required that porting take place when the type of service that results is to be different, as in the case of wireline to wireless porting. (Docket No. 2005-118-C, *see* T. 35-36, 85; Docket No. 2005-67-C, T. 245.) The FCC also has held that VoIP providers are entitled to obtain numbers[10] and that their service may not be prevented from exchange with telecommunications carriers.[11] In any event, the manner in which MCI and TWCIS plan to engage in number portability will result in the same end user retaining the same location (Docket No. 2005-118-C, T. 34-35, 82-83, 85; Docket No. 2005-67-C, T. 244), and MCI would not prevent TWCIS end users from porting their numbers and service to Horry. (Docket No. 2005-67-C, T. 187.)[12]

14. The practical effect of the Order is to severely restrict the services that consumers in the affected service areas will enjoy, while implicitly permitting Horry to offer competing services premised on interconnection, traffic exchange and number portability similar to that requested by MCI. The Commission's rulings on Issue Nos. 2, 4(a), 7 and 9 are based on a mistaken interpretation of the law and facts in this case. Accordingly, and for the reasons stated, MCI urges the Commission to reconsider its decision in this proceeding, or, in the alternative, grant MCI's request for rehearing.

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[10] *In the Matter of Administration of the North American Numbering Plan, CC Docket 99-200, Order*, FCC 05-20, 2005 WL 283273 (F.C.C.), 20 F.C.C.R. 2957, 20 FCC Rcd. 2957 (rel. February 1, 2005).

[11] See *In the Matter of Madison River Communications, LLC and affiliated companies,* File No. EB-05-IH-0110, Order, DS 05-543, 2005 WL 516821 (F.C.C.), 20 F.C.C.R. 4295, 20 FCC Rcd. 4295 (rel. March 3, 2005).

[12] Although the Commission in this respect speculates that "there is no assurance that the end-user customer that requested the port will actually retain the number" (Order at 17), any such concern is irrelevant. What is relevant is that the systems used by the industry, including by MCI (for TWCIS), to port numbers are not dependent on the release of the number by the current or "losing" provider of service, and MCI (for TWCIS) would not prevent the end user from moving to another provider. MCI and Horry have also agreed that there must be proof of customer authorization of change in service should "slamming" be suspected. (Docket No. 2005-118-C, T. 34-35.)

WHEREFORE, MCI respectfully requests that the Commission issue an Order of reconsideration or rehearing:

A. Reversing its decision in the Order;

B. Issuing a decision that adopts MCI's proffered language, or, in the alternative, grants MCI's request for rehearing; and

C. Granting such other relief as is just and proper.

Dated this 23rd day of January, 2006.

By: Dana Cothran

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BEFORE THE SOUTH CAROLINA PUBLIC SERVICE COMMISSION

In Re: Petition of MCImetro Access Transmission Services, LLC for Arbitration of Certain Terms and Conditions of Proposed Agreement with Horry Telephone Company, Concerning Interconnection and Resale under the Telecommunications Act of 1996	)	Docket No. 2005-188-C

CERTIFICATE OF SERVICE

I, Betty J. DeHart of Woodward, Cothran & Herndon, Attorneys for MCI, Inc., do hereby certify that I have served a copy of the Petition for Reconsideration or Rehearing of MCIMetro Access Transmission Services, LLC by causing to be deposited in a United States Postal Service mailbox copies of the same, postage prepaid, addressed to the persons indicated below.

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Betty J. DeHart

SWORN to before me this

23rd day of January, 2006.

Notary Public for South Carolina (L.S.)

My Commission Expires: 7/25/15